

## THE SANCTION OF A DUTY

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What is a legal duty? Terry says, "A person who is commanded or forbidden by law to do an act is under a legal duty to do or not to do it."<sup>1</sup> It is defined by others in similar terms.<sup>2</sup> But when is a person commanded? What constitutes a command? What penalty for doing an act must the law impose to warrant the statement that the act is forbidden? Is it convenient or desirable to say that one is under a duty to perform every act or forbearance for the non-performance of which the law imposes upon him a penalty or disadvantage?

When we think of a legal duty we think of a threat. The state says to one, "If you do a certain act I will cause you harm." This is a threatening attitude. It is the placing of one in a position of peril. Duty has reference to that situation in which one finds himself when, if he does or forbears to do an act, punishment is imminent. Imminency of harm for doing or forbearing to do an act seems to be the gist of the relation.<sup>3</sup> Yet

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<sup>1</sup> TERRY, *LEADING PRINCIPLES OF ANGLO-AMERICAN LAW* (1884) 84.

<sup>2</sup> "When the law recognizes an act as a duty, it commonly enforces the performance of it, or punishes the disregard of it." SALMOND, *JURISPRUDENCE* (7th ed. 1924) 236.

"When the state may compel B to carry out, either by act or forbearance, the wishes of A, we may indifferently say that A has a legal right or that B is under a legal duty." HOLLAND, *ELEMENTS OF JURISPRUDENCE* (13th ed. 1924) 88.

"A duty is relative, or answers to a right where the sovereign commands that the acts shall be done or forborne towards a determinate party, other than the obliged." AUSTIN, *JURISPRUDENCE* (3d. ed. 1869) 413.

"It (duty) is the legal relation of a person, B, who is commanded by society to act or to forbear for the benefit of another person, A, either immediately or in the future, and who will be penalized by society for disobedience." Corbin, *Legal Analysis and Terminology* (1919) 29 *YALE LAW JOURNAL* 163, 167.

<sup>3</sup> A penalty may be a sufficient sanction for a duty even though the penalty is not regarded as detrimental by the one under the duty. A \$25. judgment would be but slightly onerous against a millionaire, or one who is "judgment proof" may take the sheriff's execution very lightly. A tramp may even prefer a cot and three meals a day in jail to sore feet and a straw pile on the road.

In employment contracts it has been suggested that since suit by an employer against a defaulting employee is usually impracticable there is no duty owed by the employee to the employer. This seems unsound since there is always the possibility that a judgment may prove valuable by the employee's acquisition of property. See COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* (1924) 285, 286.

does logic or convenience dictate that the imminency of any harm or detriment for doing or failing to do an act shall constitute a duty? If all legal detriments do not sanction legal duties, what is the test for determining which do and which do not? The following are examples of questions that arise. If one, who is the heir of his grandmother displeases her, causing her to will her money to another, has he violated a duty? If a holder of a note fails to notify an endorser of the maker's default so that he loses his right against such endorser, has he violated a duty to the endorser? If an applicant for insurance misrepresents the state of his health, or fraudulently conceals a material fact and his contract is avoided because of this, has he violated a duty? Is one under a duty to retreat when assaulted? Before placing a criminal charge against another is one under a duty to make a full and fair statement of the case to an attorney? Is a retiring partner under a duty to give notice of his withdrawal to those with whom the firm has dealt? In the case of a breach of contract is the injured party under a duty to mitigate damages? If a witness has been asked a question the answer to which might incriminate him, is he under a duty to claim immunity? Is one, acting in good faith, under a duty not to sue another on an unfounded claim? Is one under a duty not to be negligent if no harm results, or not to be contributorily negligent? Is a parent under a civil duty to his minor child for support? Is a creditor under a duty to his surety not to extend time to the principal debtor? Is a depositor under a duty to notify his bank of returned forged checks?

In order to find a satisfactory answer to these questions and others that could be suggested, it seems desirable to give consideration to the different kinds and degrees of punishment recognized by law, and to attempt to ascertain the most convenient and useful terminology for describing the threat of these varying forms of punishment.

Suppose *X* is the father of two sons, *D* and *C*. As a reward for their respective services, the father has given *C* three apples and *D* one apple. To discourage *D* from harming *C*, because of the unequal distribution of the apples *X* may threaten *D* in any one of five ways. He may say to *D*, "If you harm *C*,

1. "I will not take one of *C*'s apples from him and give it to you.
2. "I will not permit you to take one of *C*'s apples by your own act.
3. "I will not permit you to receive one of *C*'s apples by his own act.
4. "I will permit *C* to take your apple from you, by his own act.

5. "I will take your apple from you and give it to C."<sup>4</sup>

With *X* corresponding to the state, *C* and *D* to members of society in that state, and the apples to groups of beneficial legal relations, these five types of punishment are roughly analogous to the different forms of punishment that may be imposed by the law. Examination of these modes of punishment reveals that the first three are different forms recognized by the law for *preventing one from acquiring benefits*, and the last two are different forms for *depriving one of benefits*. Fundamentally, it is believed, all forms of punishment possible under the law may be resolved into one or the other of these two classes.

To deprive one of the use, possession or ownership of tangible objects or to prevent him from acquiring the use, possession or ownership of them is to punish him. To put one in jail or to prevent his getting out, to put a hot iron to one's hand or to refuse to take it off is to punish him. But all benefits and detriments under the law may be resolved into beneficial and detrimental legal relations. One's ownership of a tangible object consists of certain rights, privileges, powers and immunities with respect to such object. So when it is said that the law may punish by taking from him, or preventing his acquiring something beneficial, the reference is to beneficial, desirable or advantageous legal relations. He is punished by being deprived of or prevented from acquiring rights, privileges, powers and immunities. Such relations, singly or in groups constitute the apple of the law. Deprivation of the rights, privileges, powers and immunities that constitute one's legal life is the heaviest penalty the law can inflict. Of slightly less value is the privilege of free and unrestrained locomotion. Of still less value are legal relations with respect to contracts and property. But deprivation or prevention of acquisition of any of these constitutes the law's method of punishment.<sup>5</sup>

With *X* as the state, *C* and *D* as members of society, and substituting beneficial legal relations for apples, *X*'s five threats of

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<sup>4</sup> *D* might be required to forfeit an apple to *X* but, under our theory of criminal law, it would be held for the benefit of *C* and other members of society. This is therefore a part of (5).

<sup>5</sup> Another form of expressing the two fundamental modes of punishment is to say that one may be punished by causing him either to acquire or retain detrimental legal relations. But if one is deprived of or prevented from acquiring beneficial legal relations, he necessarily acquires or retains the contraries of such relations, which are detrimental. If one is deprived of certain rights, privileges, powers and immunities with respect to a certain tangible object he will acquire certain no-rights, duties, disabilities and liabilities. To say that he loses a right is to say that he acquires a no-right, and to say that he is prevented from acquiring a power is to say that he retains a disability. The statement of one is the statement of the other.

punishing *D* may be now restated. *X* may threaten that if *D* acts in a certain manner toward *C* one of the following five forms of punishment will follow:

1. *X* will refuse to intercede as against *C* to enable *D* to acquire beneficial legal relations.
2. *X* will refuse to recognize *D*'s act as automatically acquiring for him beneficial legal relations.
3. *X* will refuse to recognize *C*'s act, or another event, as automatically creating in *D* beneficial legal relations.
4. *X* will recognize *C*'s act, or another event, as automatically depriving *D* of beneficial legal relations.
5. *X* will intercede for *C* to deprive *D* of beneficial legal relations.

A study of the above five penalties discloses that in (1) the state threatens what Hohfeld called a no-right, in (2) it threatens a disability, in (3) a detrimental immunity,<sup>6</sup> in (4) a detrimental liability, and in (5), in response to the demand of *C*, an executive or judicial order, judgment, decree or similar act adverse to *D*. Another way of stating the same thing is to say that the state threatens the following deprivations; in (1) a right, in (2) a power, in (3) a beneficial liability, in (4) a beneficial immunity, and in (5) a privilege. It has been said above that in order for a duty to exist in a person, there must be a threat or imminency of the incurrence of a legal disadvantage in such person. The state must say to him "If you do or fail to do this act I will cause you harm." The term "duty" does not describe the relation that exists after the act has been done for which the law metes out punishment, but it describes the relation existing prior to such act.<sup>7</sup> Any person has the power to

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<sup>6</sup> See HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) 35. The first reaction to a study of Hohfeld's tables is that there are but four detrimental legal relations, and therefore but four types of penalties recognized by law, but further study reveals that a liability may be either detrimental or beneficial, depending upon what one is liable to receive, something beneficial or something detrimental. Therefore those liabilities only are detrimental that have reference to detrimental legal relations. Since liability may be either detrimental or beneficial, its negative, immunity, may likewise be either beneficial or detrimental. If one is immune from the creation in himself of something detrimental, immunity is an advantage and is valuable, but if one is immune from the receipt from another of legal advantages he has something detrimental. Therefore immunity from the creation by another's act of beneficial relations must be added as a fifth type of punishment.

In the above scheme of penalties Hohfeld's views are departed from to the extent that impersonal events are recognized as having powers and disabilities. This explains the clause "or another event" used in penalties (3) and (4).

<sup>7</sup> Putting a man under a primary duty is not ordinarily a mode of punishment for doing an act, but putting him under a secondary duty, no-right,

do an act resulting in an immediate legal disadvantage to himself. Such legal disadvantage must necessarily consist of a detrimental legal relation, and such relations are limited in number. According to Hohfeld's system of analysis, which is believed to be sound, there are but five. Whether there is a legal duty presently existing in *D* not to do a certain act should depend upon the character of the detrimental relation that *D* creates in himself by doing such act. It might be said without any offense to logic that if *any* detrimental legal relation is created in him by his doing an act, he is under a duty not to do such act. But usage of the term "duty" does not justify such a broad connotation. It would lead to absurd results. For example, since if *D* abandons his property he loses those beneficial relations with respect to it that constitute ownership, he would be under a duty not to abandon it. Likewise he would be under a duty not to give his property to another. A limitation of the scope of duty therefore seems desirable. To what extent should it be limited? An answer to this question requires a further study of the five penalties set forth above.<sup>8</sup>

I. *Supposing that the threat of X is that if D does or forbears to do an act, X will refuse to intercede as against C to enable D to acquire a beneficial legal relation, is D under a duty to forbear or do such act?* If *D* has done an act resulting in the loss of his right, an agent of the state will refuse, upon *D*'s demand, to proceed against *C* or his property. This is a punishment to *D* for doing such act, because it prevents him from acquiring desired legal relations with respect to *C*'s property or person. If *D* should sue *C* on a claim barred by the statute of limitations the court's judgment would be for *C*, and the sheriff would refuse to levy upon and sell *C*'s property to satisfy *D*. If *D* should ask for an injunction restraining *C* from committing a continuing trespass upon *D*'s land, and the court should refuse to grant it because *D* had given *C* permission, the loss of *D*'s right that *C* should not trespass would be the penalty imposed upon *D* for

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liability or disability may frequently be such. It is thus seen that no-right, liability and disability as modes of punishment must be classified with a secondary duty and not with a primary duty. It is not useful to say, because a person will come under a primary duty if he does a certain act, that he is therefore under a duty not to do such act.

Throughout this article, "duty" is used in the sense of "primary duty" unless otherwise indicated.

<sup>8</sup> It does not follow from the above that all duties, no-rights, disabilities, liabilities and detrimental immunities that one may have or acquire are penalties. One has many of each from birth and he acquires many through no act of his own. It is only when they are imposed as a result of certain conduct on his part that they can be spoken of as penalties. All members of society are burdened with thousands of primary duties, no-rights, disabilities and liabilities in rem, but the state has not imposed them as penalties for misconduct.

giving *C* permission. If a fire insurance policy provides that it shall become "void" if there is a change in "title, ownership or possession" of the property, and *D* violates such provision, it is usually held that the clause is "self executing" and that, therefore, in case of loss by fire, *D* has no right that the policy shall be paid.<sup>9</sup> In each of these cases *D* has done an act resulting in the loss to himself of a right. In so doing has he violated a duty?

In an unusually stimulating and valuable article,<sup>10</sup> Professor Arthur L. Corbin has come to the conclusion that under some circumstances, the threat of a deprivation of a right should establish the existence of a duty. He does not give a generalized statement of his test for determining what is and what is not a legal duty, but from an examination of the examples given it might be concluded that he regards as a duty not only those relations sanctioned by remedial duties but, to some extent, those sanctioned by no-rights and liabilities. The writer believes that there are several objections to this view and an attempt will be made to present them. A consideration of the several illustrations of duties used in the article referred to will make possible a clearer presentation of the points of criticism. It is said by him that a creditor is under a legal duty to the surety not to give an extension of time to the principal debtor, because if he does so he suffers the penalty of losing his conditional right to payment from the surety.<sup>11</sup> The existence of this penalty makes the act of giving time a breach of duty. If *C*, the creditor, is under a duty to *S*, the surety, then *S* has a right against *C* that *C* shall not extend the principal debtor's time. But can it be said in any customary sense that *S* has such a right? Professor Corbin says in another part of his article that "a 'right' exists when its possessor has the aid of some organized governmental society in controlling the conduct of another person."<sup>12</sup> But can *S* in any sense *control* the conduct of *C*? Neither by his own act nor by aid of an agent of the state has *S* a power, conditional or unconditional, to impose a penalty upon *C*. *S* is helpless. The whole situation is in the control of *C*. He has the legal power to extinguish his own right against *S* by doing the act of extending time to the principal debtor. As between *S* and *C*, *S* occupies the undesirable or servient position. We do not ordinarily think of one who is in such a state of subjectivity to another as having a right against that other.

Can it be said that in every case where one has the legal power to extinguish his own right against another he is under a legal

<sup>9</sup> *Carey v. German American Ins. Co.*, 84 Wis. 80, 54 N. W. 18 (1893); *Keith v. Royal Ins. Co.*, 117 Wis. 531, 94 N. W. 295 (1903).

<sup>10</sup> Corbin, *Rights and Duties* (1924) 33 YALE LAW JOURNAL 501.

<sup>11</sup> *Ibid.* 520.

<sup>12</sup> *Ibid.* 502.

duty not to exercise such power? For example, is one under a duty not to give or sell his property to another because in so doing he extinguishes his own rights with respect to it, or is he under a duty not to assign his contractual rights since in so doing he loses them, or under a duty not to waive his "rights" or do acts constituting estoppel, since if he does so he loses "rights?" We do not ordinarily think of any of these situations as creating duties. Unless the conclusion is accepted that in all of these cases the power to destroy one's own right sanctions a duty, then a rule for distinguishing those cases that do from those that do not must be devised. To be without such a rule would make it impossible to know what is and what is not a duty. Is there such a rule?

That confusion is likely to result is shown by another example used by Professor Corbin. He says that a creditor is not under a duty not to release his debtor.<sup>13</sup> Why not? If he releases him he loses his right against him. Why say that if a creditor releases his surety, by extending time to the principal debtor, he has violated a duty, but if he releases his principal debtor by giving him a sealed release he has not violated a duty. In each case *C* has exercised a power. In each case the effect of his act is to destroy a valuable right in himself. The right given up in the latter case is really more substantial than the one given up in the former as it may be the only one the creditor has for compelling payment of the debt. It may be contended that the difference in the two cases lies in the fact that in the first, unless the surety is held to be released, he may be harmed or prejudiced by an extension of time to the principal debtor, whereas in the other, no harm can result to the debtor if he is not released by the instrument given to him by the creditor.<sup>14</sup> But may not a debtor be prejudiced by believing, contrary to fact, that he has been discharged from his debt? Is he not injured if he is required to pay a debt which the parties intended should be discharged? But, however that may be, this reasoning is to put the cart before the horse. It seems to the writer fundamental that whether there is a legal duty in *D* not to do an act ought to be determined not by the physical, economic or social harm resulting to *C* from the act, but by the legal consequences of the act upon *D*. Whether an act is a legal wrong depends upon the character of punishment imposed by the law for doing it.<sup>15</sup> Even if these two cases are

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<sup>13</sup> "A creditor loses a valuable right when he releases his debtor but this loss is not a societal penalty for doing a wrongful act." *ibid.* 522.

<sup>14</sup> That injury to the surety is not the basis of the rule, however, see SPENCER, SURETYSHIP (1913) 315.

<sup>15</sup> In morals it may be said that the existence of a duty in *D* depends upon whether harm results to *C*, but in law resulting harm to *C* by the act or omission of *D* does not determine the existence of a duty in *D*. The duty

looked at from the moral point of view, it is hard to see that there is anything more wrongful in a creditor's extending time to his principal debtor than in his releasing the principal debtor altogether. In substance both would seem to be acts of charity. It is true also that there is a third party in one case and not in the other, but that fact has no bearing whatever upon the character or severity of the penalty the creditor brings down upon himself. It would seem too, that the fact that *C* has the intention to release his debtor in the second case, but has no such intention in the other case can hardly be material to the question of sanctions for a duty. If so it opens up another problem which would make it difficult indeed to determine whether or not a duty had been violated in a particular case.<sup>10</sup> If there is reason

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not to do an act exists, not because to do it will harm *C*, but because the law will penalize *D* if he does it.

That a duty in *D* is not dependent upon his act or omission resulting in physical, economic, or social harm to *C* is established by the cases recognizing the existence of a legal duty where no such harm results. Even though a breach of contract by *D* results in no actual damage or harm to *C*, *C* may recover nominal damages. See cases cited in 3 WILLISTON, CONTRACTS (1920) § 1340. Actual damage to the plaintiff is not an element in an action for damages to realty. See *Pfeiffer v. Grossman*, 15 Ill. 53 (1853), where it was held there could be a recovery even though the defendant's act was actually beneficial to the plaintiff.

On the other hand, that *D* may inflict unquestioned economic harm on *C* without violating a legal duty see, *Marlin Firearms Co. v. Shields*, 171 N. Y. 384, 64 N. E. 163 (1902); *Passaic Print Works v. Ely*, 105 Fed. 163 (C. C. A. 8th, 1900).

<sup>10</sup> If a tramp should commit an act of vagrancy with the object and intention of obtaining the sleeping and eating accommodations of a jail for a few days, he would nevertheless have violated a duty in doing that act. That the legal detriment is intended, desired, or willed would not seem to prevent the existence of a duty.

It also seems true that the purpose or object of the state in imposing a penalty is not influential in determining whether the act for which the penalty is imposed is in violation of a duty. That question should be sharply distinguished from the question of determining what act the state has penalized. In the latter question, purpose is a material consideration. *E. g.*, due to the ambiguity of a statute or the obscurity of judicial decisions, it may sometimes be difficult to say whether the law penalizes act *X* or act *Y*. Suppose a statute requires that if a person sells intoxicating liquor he shall pay a fee to the state. Does this law command that intoxicating liquor shall not be sold under penalty of paying a fine, or does it command that if one sells liquor he shall pay a tax? In other words is one under a duty not to sell intoxicating liquor or under a duty not to fail to pay a tax if he does? To answer the question as to *which act* the state forbids, it seems entirely proper to look into the purposes or object of the state in enacting such a law. However, after it is once determined what particular act is penalized, it is believed there can be no further object in looking into the motives or purposes of the law-making power. Whether the law creates a duty must then depend upon the character of the penalty imposed. If it is certain that the law penalizes the doing of a particular act, purpose then becomes immaterial on the question of whether there is



to say that there is a duty in one of these cases and not in the other, to say the least, it is such as is likely to lead to confusion and difficulty of application.

A further objection to the view that a creditor is under a duty not to extend time to his principal debtor is that it throws confusion into the law of conditions in contracts, a field in which Professor Corbin has rendered invaluable analytical service.<sup>17</sup> He has said that a condition in the law of contracts is a fact subsequent to the making of an agreement and prior to its discharge, which operates to create or extinguish legal relations.<sup>18</sup> Following this view, I should say that a creditor is not under a duty to a surety not to give an extension of time to the principal debtor, but that the creditor's not giving such extension is a condition precedent to the surety's duty to pay, and that the effect of the non-fulfillment of such condition is to prevent the creation of an instant right-duty relation between the creditor and the surety. Or it could be said that the extending of time is a condition subsequent, operating to extinguish the antecedent conditional right-duty relation between the creditor and the surety. In either case, after all the facts have happened the creditor has no right against the surety. This argument is anticipated by Professor Corbin, and is answered in a note by his saying that this is not a condition because, "such is not the language of the parties or their actual intention."<sup>19</sup> But no one has a better reply to this answer than Professor Corbin himself, who on another occasion in speaking of conditions, said: "a fact will operate as a condition when the court believes that justice requires it even tho the parties neither had nor expressed any intention regarding it."<sup>20</sup> This is a good example of a fact

a legal duty. Presumably, the law purposes what it accomplishes. To the extent that it does not, purpose is unimportant.

Furthermore, the frequent ambiguity of the law's purposes deprives that element of any practical utility in determining the existence or nonexistence of a duty. Suppose *C*, after having been erroneously advised by his attorney that a written release given for less than the full debt is ineffectual, delivers a release in full to *D* in order to obtain a part payment of the debt, who can say that the purpose of the law in preventing the creditor from recovering the rest of the debt is not to punish the creditor? Whether or not that is the purpose, it is the result.

<sup>17</sup> Corbin, *Conditions in the Law of Contract* (1919) 28 YALE LAW JOURNAL 739; ANSON, *CONTRACTS* (Corbin's ed., 1919) §§ 355-372.

<sup>18</sup> ANSON, *op. cit. supra* note 17, § 356. To the same effect see COSTIGAN, *THE PERFORMANCE OF CONTRACTS* (2d ed. 1927) 5.

<sup>19</sup> Corbin, *op. cit. supra* note 10, at 520, n. 24.

<sup>20</sup> CORBIN, *CASES ON CONTRACTS* (1921) 478. At another place the statement is made that a fact will operate as a condition "because the court believes that by reason of the *mores* of the time, justice requires that it should so operate." ANSON, *op. cit. supra* note 17, § 357. See also 2 WILLISTON, *op. cit. supra* note 15, § 825; COSTIGAN, *op. cit. supra* note 18, at 8; Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 466.

held to be a condition because of the belief that justice requires it. There are too many cases recognizing constructive conditions for it now to be said that expressed or implied intention is determinative of whether or not there is a condition. As to whether there is a constructive condition must be determined by considerations of justice and the *mores* of the time. Professor Corbin has not said that since *C* may lose a right by the non-fulfillment of a condition he is therefore under a duty to fulfill the condition. He simply says that the creditor's not extending the time of the principal debtor is *not* a condition, but that since *C* loses his right by such extension he is under a duty not to extend time. But if this view is accepted, what is to be the test for determining whether the facts of a particular situation operate to create a condition or a duty? If a breach of some duties is to have the same legal effect as the non-fulfillment of a condition, how are we to distinguish a broken condition from a violated duty? It is submitted that with the acceptance of Professor Corbin's view that a creditor is under a duty not to extend time to his principal debtor the test for determining what is and what is not a constructive condition vanishes.<sup>21</sup>

Decisions of courts do not aid in an answer to this question, for they have not attempted to distinguish what is and what is not a condition along that line.

Much of the criticism set forth above applies with equal force to Professor Corbin's statement that a depositor is under a duty to examine his returned checks and notify the bank in case he detects forgery because if he does not notify the bank he loses his right to recover the amount of the forged checks from the bank, and likewise to the statement that a minor child is under a duty to obey its parent because the parent is privileged to spank. The argument in the latter case apparently is that if the child disobeys it loses its right that the parent shall not assault.<sup>22</sup> The threat of the loss of this beneficial relation, it is said, creates a duty in the child.<sup>23</sup>

Professor Corbin says that if the only rule against homicide

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<sup>21</sup> In some installment contract cases it has been held that where the plaintiff has failed to include in his action all installments due at the time of action, he thereby loses his right to the omitted installments. Here is a case in which the plaintiff has acquired an unconditional present right which is extinguished by his failure to ask for its enforcement in another suit. Has he violated a duty, or is this an illustration of a condition subsequent? See *Beecher v. Conradt*, 13 N. Y. 108 (1855). That it is a condition subsequent see *COSTIGAN, op. cit. supra* note 18, at 20.

<sup>22</sup> Although the common law recognizes no civil duty in the father not to assault his child, the father is amenable to the criminal law if he punishes unreasonably. See *TIFFANY, PERSONS AND DOMESTIC RELATIONS* (2d ed. 1909) 264.

<sup>23</sup> Corbin, *op. cit. supra* note 10, at 520, 521.

is that *B* shall be outlaw if he kills *A*, and anyone (*X*) is privileged to kill *B* and to seize his goods, then it is proper to say that *B* is under a duty not to kill. But it is believed that if this is so it is only because *X* by such rule has become the agent of the state. Professor Corbin seems to be of the opinion that even though *X* is not the state's agent, *B* is under a duty, for he says that "the fact that a rule provided that the sheriff and other peace officers will not act against *X* for killing *B*, operates as a heavy penalty and a preventive."<sup>24</sup> That is to say, *B* is punished for his act of killing *A* by being deprived of his rights that *X* shall not take his goods or his life. In their stead are no-rights, and *X* has privileges to take *B*'s goods or his life. The state threatens *B* thus: "If you kill *A* you will be penalized by having no claims against *X* for taking your property or your life." But suppose *B* does an act operating to give *X* a privilege to walk across *B*'s land, the sheriff and other officers will not act against *X* if he walks across. *B* has no right that *X* shall not walk across. The threat of the state to *B* here, likewise, is: "If you give *X* permission to walk across your land you will be penalized by having no claims against *X* for taking such privilege." But is that a sufficient penalty to justify the statement that *B* is under a duty not to give *X* the privilege to walk across?

In view of the above considerations it is believed the term "duty" should not be used to describe that relation sanctioned merely by the penalty of the loss of one or more rights.

II. *Supposing that the threat of X is that if D does or forbears to do an act, X will refuse to recognize another act of D as automatically acquiring for him beneficial legal relations, is D under a duty to forbear or do the former act?* If the law regards an act of *D* as rendering him incapable of acquiring beneficial legal relations he is being penalized for the act. If *D* conveys Blackacre to *C*, *D* cannot ordinarily reacquire title to it without *C*'s consent. Neither will his deed be operative to convey it to *B*. Here is a disability, a form of punishment or restraint of liberty that the law places on *D* for selling Blackacre. Who would say that *D* is under a duty not to convey Blackacre to *C* because of the imminence of this disability? If *C*'s offer to *D* is revoked or lapses, *D*'s power of acceptance is extinguished and his act of acceptance is inoperative. It will not result in *D*'s acquiring a right under the contract. It is a nullity, and a penalty imposed by the law for a late acceptance. It hardly accords with usage to say that because of the threat of such a penalty, *D* is under a duty to accept *C*'s offer. It has not been seriously contended that such a penalty sanctions a duty.

III. *Supposing that the threat of X is that if D does or for-*

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<sup>24</sup> *Ibid.* 519.

bears to do an act, *X* will refuse to recognize an act of *C*, or another event, as automatically creating in *D* beneficial legal relations, is *D* under a duty to forbear or do such act? If one is rendered immune from the receipt of a legal advantage from another, he is caused to suffer a penalty. This is what may be called a detrimental immunity. If *D* witnesses a will in which he is a devisee, the devise, in most states, is void.<sup>25</sup> *D*'s act of witnessing the will renders him immune from the acquisition of the benefits of the devise. This is a penalty for his attesting the will. But it is believed that *D* is not under a duty not to attest the will. No one except a native born or naturalized citizen of the United States may hold federal office. This means that one who is not a citizen has a detrimental immunity from the receipt of the "emoluments" of federal office. We speak of this usually as an incapacity or disability of the alien, but more accurately it is an incapacity or disability of the electors to present him with the office. This is a penalty for his failure to become naturalized.<sup>26</sup> Yet it hardly accords with usage to say that, because of the existence of this penalty, an alien is under a duty to become a citizen. Before equity nullified the common law rule, a woman who married became immune from the acquisition of "title" to personal property by the act of another. Correlatively, her father, or any other person, had a disability to create "title" in her. This was detrimental to her and was a penalty for marrying, but was she under a duty not to marry?<sup>27</sup> Here, also, it is believed that usage does not justify the view that a penalty of this character sanctions a legal duty.

IV. *Supposing that the threat of X is that if D does or forbears to do an act, X will recognize an act of C, or another event, as automatically depriving D of a beneficial legal relation, is D under a duty to forbear or do such act?* Here *D* is threatened with a liability to legal disadvantages. The power of punishment is placed in the hands of *C*. If *D* gives *C* an option on Blackacre,

<sup>25</sup> See, e. g., Ill. Rev. Stat. (Smith, 1921) 148, § 8.

<sup>26</sup> Of course the alien has a *disability to acquire* the office by *his own act*, but this is to be distinguished from his *immunity* from receipt of the office *by the act of others*. In the first case he has the disability and the electors the immunity. In the second case the electors have the disability and he has the immunity. Even a citizen has a disability to acquire the office by his own act, but he is not immune from receiving it at the hands of the electorate.

The "qualification" that the President of the United States shall be a native born citizen is really a detrimental immunity. The electors have a disability to elect and the alien is immune from the legal advantages of the office. This is not a form of punishment however, since the result is brought about through no act or omission of the alien. It is similar to one's immunity from acquisition of property by inheritance from one who is not his relative. See *supra* note 8.

<sup>27</sup> PECK, PERSONS AND DOMESTIC RELATIONS (2d ed. 1920) § 69.

*C* by his act of acceptance can deprive *D* of those relations constituting "equitable title" to Blackacre. If a fire insurance policy provides that *C* may "forfeit" *D*'s policy if the insured dwelling "becomes and remains vacant for more than ten days," and *D* violates such provision, his rights under the policy are in the hands of *C*.<sup>28</sup> In each of these cases *C* may do an act that will automatically deprive *D* of one or more beneficial legal relations. In such event *D* would be penalized by the act of *C* without the intercession of an agent of the state. Does the threat of the creation of this liability for doing an act place *D* under a duty not to do such an act? Here again it is believed it does not.<sup>29</sup> But Professor Corbin, in the article referred to above, says that a father owes a duty of support to his child because if he does not support it he comes under a liability to a duty to a third party who might furnish such child with necessities.<sup>30</sup> The analysis of the case seems to be this. Prior to non-support on the part of the father he has an immunity from a duty to pay a third party who might furnish his child with necessities, but his non-support deprives him of such immunity and substitutes therefor a liability. This penalty, says Professor Corbin, sanctions a duty in the father to the child.

But it is believed that if the relation of a father toward his child with respect to support is called a duty, inconsistency or absurdity in the use of the term is almost certain to result. For example, it would follow that one is under a duty not to make an offer to contract, for if he does he comes under a liability to a contractual duty.<sup>31</sup> Prior to his offer he has an immunity from a contractual duty, but his making an offer deprives him of such immunity and substitutes therefor a liability. Why is not this a penalty sanctioning a duty not to make an offer? The law says

<sup>28</sup> *Home Fire Ins. Co. v. Kuhlman*, 58 Neb. 488, 78 N. W. 936 (1899).

<sup>29</sup> It might be said one who owns a dog is under a liability to a duty to *C*, the duty being created when the dog bites *C*. Here is a threat of the law to *D* for owning the dog. Does that threat create a duty not to own the dog? Neither Hohfeld nor Corbin would call this a "liability" but, instead, a "conditional duty." The objection to calling it a liability is that it then becomes necessary to recognize a dog as having a power and the biting by the dog as an exercise of power. Although it is fundamental to Hohfeld's system to regard rights, duties, privileges and no-rights as personal, it is not fundamental to regard powers, liabilities, disabilities and immunities as personal. It is suggested that it might prove convenient in many cases to recognize nature, animals and things as having powers, and persons as being liable to a change in relations by exercise of them. See Green, *The Relativity of Legal Relations* (1923) 5 ILL. L. Q. 187.

<sup>30</sup> Corbin, *op. cit. supra* note 10, at 521.

<sup>31</sup> That an offer creates a power of acceptance in the offeree, and a correlative liability in the offeror, see Corbin, *Offer and Acceptance and Some of the Resulting Legal Relations* (1917) 26 YALE LAW JOURNAL 169; 1 WILLISTON, *op. cit. supra* note 15, at 31.

to him: "If you make an offer you will be penalized and the penalty will consist, not merely in your inability to acquire something valuable from another (which Professor Corbin says does not create a duty), but in depriving you of your pre-existing beneficial immunity to contractual relations, and creating in its stead a detrimental liability to such contractual relations." It is true that the liability of a father created by the non-support of his child is owed to a third party, but being under a liability is a penalty whether it is owed to a second party or a third party. The important point is that in both cases one has done an act resulting in his being placed under a liability. But that the third party element has no potency may be shown by the following case. If *D*'s offer to *T* is, "Deliver goods to *C* and I will pay for them," *D* is placed under a liability to *T*, and if *T* delivers goods to *C*, *D* is under a duty to *T* to pay for them. Does it follow that *D* is under a duty to *C* not to make such an offer? Yet, if a father owes his minor child a duty of support because of the threat of a liability to a third person, it would seem that consistency would require it to be said that *D* owes *C* a duty not to make the above offer because of the threat of a liability running to *T*.

But it may be asked, what is objectionable in saying that one is under a duty not to make an offer to contract. The answer is, that it has never been done. It would likewise result in confusion and would deprive the word of much of its utility as a tool for expressing a definite idea.

Professor Corbin puts the question: "Can *B* commit a breach of duty to *A* by negligent conduct even tho *A* is not hurt at all?"<sup>32</sup> As hereinafter contended, the answer to this question, it seems to me, ought to depend on whether *A* can get a judgment for damages for the commission of such negligent act, or a decree in equity restraining it. If he can do neither, there is no duty. If he can, there is. But Professor Corbin is of the opinion that there may be such a duty even though neither an action at law nor a suit in equity may be maintained. The penalty back of such duty, he says, is the "conditional duty" to pay the loss if it occurs. This is a detrimental relation, to be sure, but if it is sufficient to sanction a duty, here again we are tempted to say that the "conditional duty," or liability, of one who makes an offer to contract also sanctions a duty, and one is, therefore, under a duty not to make an offer.<sup>33</sup> The same risk of the incur-

<sup>32</sup> Corbin, *op. cit. supra* note 10, at 524 *et seq.*

<sup>33</sup> "Conditional duty" describes the same situation as a "liability to a duty," except that, in the former, the event that may extinguish the conditional duty and create the instant duty is an impersonal event, whereas, in the latter, the event that will extinguish the liability and create an instant duty is an act of a person in whom the correlative power resides.

rence of a duty exists in either case. In one case a bullet is shot into the air which may result in creating a duty in *B*. In the other, certain words are spoken into the air which may result in creating a duty in *B*. Of course there may be a difference in the severity of the penalty, but that would be only a matter of degree. There may also be moral disapprobation attached to the firing of the gun that would not attach to the making of an offer. But moral disapprobation does not determine the existence of a legal duty. To say the threat of a detrimental liability creates a duty can but lead to confusion and inconsistency.

V. *Supposing that the threat of X is that if D does or forbears to do an act, X will intercede for C to deprive D of beneficial legal relations, is D under a duty to forbear or do such act?* "Duty" is the only term that seems adequate to describe this relation. The state says to *D*: "If you commit an assault and battery upon *C*, *C* may affirmatively proceed against you in court, obtain a judgment against you and cause your property to be levied upon and sold." The effect of such procedure is to deprive *D* of his advantageous legal relations with respect to such property. *D* may do or threaten an act that will entitle *C* to an injunction against *D*, thereby depriving *D* of certain advantages with respect to his property, such as the privilege to use his building for a slaughter house. If *D* commits what the law calls a crime *C* may cause the proper agents of the state to proceed against *D* and by imprisonment deprive him of his privilege of personal freedom, or by hanging deprive him of all the rights, privileges, powers and immunities that constitute his legal life. In such cases the law enables one person to call upon the state's agents, whether they be judge, sheriff, board, or other officials, for the purpose of depriving another person of his legal benefits. The uniqueness of this type of punishment is that *C* may affirmatively require an agent of the state to inflict harm upon *D*. But it is important to note that in the ordinary civil case, the detrimental result immediately threatened by the state is not the judgment, execution and sale of *D*'s property, but the secondary or remedial duty.<sup>34</sup> That is, the state does not say to *D*, "If

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The helplessness or subjectivity of the bearer of the relation is the same in either case, and one is just as much a penalty as the other.

<sup>34</sup> In some cases, however, it seems that a breach of a primary duty does not result in the creation of a secondary duty. For example, if *D* murders *C*, *D* has violated a primary duty, but there is no act that he has a secondary duty to perform. The state simply punishes him for having murdered *C*, and *D* has no power to stay or prevent the penalty. Likewise, if a husband does an act that will give his wife a right to a divorce, he has no secondary duty to do any act. He does not have the power to give his wife a divorce. He is, however, under a primary duty not to do the act giving cause for divorce, because if he does, the state's officers can be called

you assault *C* your act will automatically result in your being relieved of your property," but the state does say, "If you assault *C* your act will automatically result in your being placed under a secondary or remedial duty to pay damages." The immediate threat is the imposition of the remedial duty, and the threat for not performing the remedial duty is judgment, execution, and the sale of *D*'s property. It seems proper, however, to say that this entire series of acts following the original forbidden act is the description of the penalty threatened by the law for doing such forbidden act. Doing the act that is penalized starts a train of detrimental events, one following in the wake of the other, finally resulting in *D*'s being deprived of a group of beneficial legal relations in his property or person.<sup>35</sup> Before doing such act *D* had a privilege not to pay damages. His doing the forbidden act operated to deprive him of such privilege and to substitute therefor the remedial duty to pay damages. This harm sanctions a legal duty.

*Conclusion.* Five legal penalties have been set out above. In many situations there will be found a combination of two or more of them, but our inquiry is, Does the imminency of each one separately create a primary legal duty?<sup>36</sup> An attempt has been made to show that to apply the term "duty" to the threat of any of the first four penalties leads to absurdities or incon-

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upon to deprive him of his marital "rights." The absence of a secondary duty seems to be limited to cases of a criminal and quasi-criminal nature.

<sup>35</sup> "But generally in modern law the remedial right is not considered as the product but as the expression of the antecedent right." DEL VECCHIO, *THE FORMAL BASES OF LAW* (1914) 188, n. 11.

"Remedial or sanctioning rights are merely part of the machinery provided by the state for the redress of injury done to antecedent rights." HOLLAND, *op. cit. supra* note 2, at 148.

There are numerous steps in the procedure provided by law for enabling *C* to procure a judgment against *D*. These steps involve various powers and liabilities between *C* and *D*, and between each party and the court. However, it is believed that an analysis of this relationship is unnecessary in determining the substantive relations of the parties. Such relations are determined by facts existing prior to the commencement of an action. Those are the facts that form the basis for a prediction as to what a court will do. If it is desired to carry the analysis into the procedural field, it might be said that the effect of a breach of duty is the creation of a power in *C* to confer upon a court the power to render a judgment against *D*. *C* exercises such power by instituting a proper action and presenting his evidence. Correlative to such power in *C* is a liability in the court until the action is filed and evidence presented. Then the court has the power to render, and *D* is under a correlative liability to the rendition of an adverse judgment.

<sup>36</sup> It should be kept clearly in mind that our present inquiry is not whether each of these penalties has a sanction, but whether each of these penalties sanctions a duty. The writer believes, however, that each of these five penalties has a sanction, for otherwise they would not be penalties.



sistencies. Furthermore, the terms "no-right," "disability," "detrimental immunity," and "detrimental liability" seem to be adequate verbal tools for describing those penalties.<sup>37</sup> But to describe the fifth penalty, "duty" is most convenient if not necessary. Why use "duty" for any of the first four situations when it is not needed? Why not reserve it for a single use, and thereby eliminate possible confusion and promote nicety and precision of expression?

As suggested at the outset, the answer to our inquiry, as to the scope of "duty," should depend upon what, in view of the best usage and consistency, is most convenient.<sup>38</sup> It is believed that the simplest and most convenient connotation that may be given to the term, and one substantially in accord with the best usage, is that *D* is under a duty to *C* to act or forbear when, if *D* does not so act or forbear, *C* may procure a judgment, decree, order or similar act of a court, board, official or other agent of the state, compelling *D* either to do the act or forbearance, or to suffer the deprivation of beneficial legal relations for not so acting or forbearing.<sup>39</sup> If such act or forbearance creates in

<sup>37</sup> Of course these terms do not describe a threat existing before the act creating them occurs. They describe the situation after the law's threat has been executed. A term to describe the antecedent relationship seems unnecessary. The whole situation can be adequately described by stating the consequences of the act. *E. g.*, if *D* does act *Y* he will be under a disability.

For a classification of duties into perfect, or those enforceable by suit, and imperfect, or those sanctioned by some other form of coercion, see TERRY, *op. cit. supra* note 1, §§ 140 and 141, and also SALMOND, *op. cit. supra* note 2, § 78. If there is a sufficiently pressing need of a term to describe the threat of these milder forms of penalty, we might borrow from Terry and Salmond their term "imperfect duty" even though it was used by them in a somewhat different sense.

<sup>38</sup> It may be said that whether there is a punishment for a particular act depends upon how the advantages accruing from such act balance up against the disadvantages resulting from the act. *E. g.*, if *D* sells *C* property he loses his beneficial relations with respect to it but acquires beneficial relations with respect to the purchase money which offset his disadvantages. But it hardly seems that such is relevant to the issue for two reasons. (1) To determine whether there is a duty in a particular case would involve the delicate weighing of advantages and disadvantages, and (2) in every case, in theory, advantages balance disadvantages in the end. An advantage has been gained by one. The law requires compensation for it. It has various ways for requiring such compensation. The very matter we are discussing is how compensation shall be rendered, how advantages and disadvantages shall be equalized. If the law imposes a detriment upon one for the benefit of another in any case, it is usually upon the theory that it is owing. See HOLLAND, *op. cit. supra* note 2, at 326.

<sup>39</sup> A definition of an act or omission is not here attempted. An act or omission is however an element of "duty." Unless one has in some way acted or failed to act, he has not violated a duty. There may be, however, a judicial proceeding not based upon an act or omission of a person. In such cases a breach of duty is not involved. *E. g.*, in a suit to dissolve a partnership because of the death or insanity of a partner there has been

him merely a no-right, disability, detrimental liability or detrimental immunity, he is not under a *duty*, but has a *privilege* to do or to bear doing such act. This view would enable us to determine whether an act or omission violates a duty by answering the question, Will an action lie? If it will there is a duty in the defendant. If it will not there is a privilege in the defendant.<sup>40</sup> Suppose a surety should sue a creditor alleging damages because the creditor had extended the time of the principal debtor. Judgment would go for the defendant. It seems convenient to say that such a judgment means that the creditor is not under a duty not to extend time to the principal debtor. By the application of this test the result would be reached that there is no duty in each of the other cases stated at the beginning of this article.

The solution of legal problems depends fundamentally upon the answer to two questions, (1) Can *C* act against *D* *without* the aid of a state agent? (2) Can *C* act against *D* *with* the aid of a state agent? Power, liability, disability and immunity are the verbal tools provided for answering the first question. Right, duty, privilege and no-right ought to be the tools for answering the second question.

By way of summary, the argument of this paper may be stated as follows:

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no breach of duty. Neither dying nor going insane is an act. Therefore no act has been done in violation of a duty. See HOLLAND, *op. cit. supra* note 2, at 108; Cook, *Act, Intention, Motive* (1917) 26 YALE LAW JOURNAL 645.

<sup>40</sup> The impression is not intended to be left that all difficulties disappear if the suggested connotation of duty is used. But it is believed that they would be reduced to a minimum. If an action is brought in the wrong court, or if it is brought in a court when it should properly come before an administrative board or other official, judgment will be entered for the defendant. Does this determine that the defendant is not under a duty? So far as the jurisdiction of such a court is concerned it is probably correct to say that the defendant is under no duty to the plaintiff, but if there is another court, administrative body, or official that may compel the defendant to act according to the law of the land, it would seem that he is under a duty to the other party. *E. g.*, if in a state having a workmen's compensation act, an action is brought in a court of general jurisdiction for an injury sustained in the course of and growing out of employment, the court will render judgment for the defendant. In that court the defendant has a privilege instead of a duty, but since a workmen's compensation board would render an award for the plaintiff, the law of the state is that the defendant is under a duty to the plaintiff. Difficulties of application might arise in cases where a party does not allege or introduce evidence of all the operative facts, or where, through the negligence or incompetency of his attorney, advantage is not taken of rules of practice or procedure, or where an appeal is improperly prosecuted, or where, though an action lies, it is doubtful whether it is based on an act or omission of the defendant, *e. g.*, a proceeding to construe a will. But the purpose of this article does not require a solution to these problems.

1. The existence of a duty in *D* to do or not to do an act is not dependent upon a resulting physical, economic or social injury to *C*.

2. The existence of a duty in *D* to do or not to do an act is dependent upon a resulting imposition by the state of a penalty upon *D*.

3. As a result of an act or omission of *D* the state may punish him either (a) by *preventing him from acquiring* beneficial legal relations or (b) by *depriving him of* beneficial legal relations. The state may accomplish the former by imposing either (1) a no-right, (2) a disability or (3) a detrimental immunity. It may accomplish the latter (4) by the imposition of a detrimental liability, or (5), in response to the demand of *C*, by an adverse executive or judicial order, judgment decree, or similar act.

4. It is not convenient to regard any of the first four penalties as sanctioning a duty, because to do so would require a test difficult of application, and almost certain to produce inconsistent or absurd results.

5. It is most convenient to regard only the fifth penalty, *viz.*, an adverse executive or judicial act in response to *C*'s demand, as sanctioning a duty. When the scope of "duty" is thus limited, it becomes a term of certainty and precision, and a useful tool for clear and accurate expression.<sup>41</sup>

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<sup>41</sup> Professor Corbin is quite right when he says that no criterion for determining what is and what is not a duty is a necessary one, "all others being 'untrue'." All that is attempted or intended in this paper is the submission of an alternative test to that proposed by Professor Corbin, with some reasons why it is thought to be more convenient.